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IN THE

Supreme Court of the United States

October Term, 1965.

No. 1085.

IKE DOVBERG and MAURICE DOVBERG, Individually and t/a PASTE COMPANY OF AMERICA,
Petitioners,

v.

DOW CHEMICAL COMPANY, et al.,
Respondents.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

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The important question presented by the petition for certiorari (pp. 61-66) turns on the propriety of setting aside a jury verdict in petitioners' favor. Critical to a correct determination of that question is the rule, honored by the dissenting opinion of Chief Judge Kalodner, Judge Biggs and Judge Staley, that the evidence must be viewed in the light most favorable to petitioners.

The rule is not difficult of application here. The trial judge analyzed petitioners' evidence in a 75-page opinion filed in connection with his denial of defendant's motion for directed verdict, concluding there that "sufficient factual questions have been presented by plaintiff to allow the jury to rule on the issues" as to Papco (19a) and that "substantial evidence has been introduced" in support of plaintiffs' charges against Schultz (33a). Chief Judge Kalodner's dissenting opinion sets forth a summary of the evidence

which, again, applies the proper rule for evaluating the trial judge's abrupt reversal of position after verdict.

It is this final reversal of position, without more, that the brief in opposition here stresses. The action of the trial judge is described as having been taken "after a painstaking review of the record" (page 4), after "careful rereading of the record" (page 13), after "prolonged study of the record" (page 15). In fact, the trial judge's reasons for entering judgment n.o.v. after a four month trial cover one printed page.[1] And there is no basis whatsoever for suggesting that this page represented study in addition to that which formed the basis for the 75-page opinion which accompanied the denial of the motion for a directed verdict.

Actually, the brief in opposition seeks to support its "careful re-reading" test by improper use of the trial judge's comments with respect to the credibility of Maurice Dovberg. Those comments were made by the trial judge in connection with the alternative ruling on the motion for a new trial. Petitioners showed in the court below, and would be prepared to show here if the occasion were proper, that there was no substance to these charges against Maurice Dovberg, made after submission of the case to the jury. Neither the majority or the dissenting opinion in the court below made reference to this aspect of the case. *A fortiori,* this aspect of the trial judge's decision cannot be converted into support for the ruling on the motion for judgment n.o.v. And there is no justification, on the question of the judgment n.o.v., for repeated references to "deliberately false testimony and intentional confusion which characterized the petitioners' case" (page 4), "deliberately false and confusing testimony offered by petitioners" (page 13), "the studied effort of the petitioners throughout the trial to

1. The trial judge's reasoning in entering judgment is succinctly stated in the dissenting opinion in the Court of Appeals (16a-17a) printed in the appendix to our petition. We did not print the entire order and direction for judgment because almost all of it is devoted to justifying the trial judge's alternative order for a new trial, a ruling which this Court has not been asked to review at this time.

confuse and deceive" (page 15), and "false testimony and confusion that added enormously to the length of the trial and the size of the record" (page 15).

The controlling standard here is that presented in the petition and at the opening of this reply—taking the evidence in the light most favorable to petitioners. Only on this basis can it be determined whether the jury verdict should have been set aside. However, petitioners can not let pass, without comment, the factual misstatements and incomplete statements made in the brief in opposition as to the proof on which the jury based its verdict.

To illustrate, the brief in opposition states (p. 13): "* * * Nowhere is there any suggestion of when the supposed conspiracy began." Under the evidence, the jury was entitled to find that Schultz became a conspirator with Papco when, sometime around March 13, 1952, Schultz stopped purchasing Nix-Size; commenced purchasing Papco's inferior product, Liqui-Size; arranged to have Liqui-Size marketed in a package identical to Nix-Size (for the obvious purpose of passing off one product as a privately branded edition of the other), and took such action with knowledge that Papco's product was being marketed in this manner solely in an effort to destroy petitioners' business (App., pp. 24a-28a).

Again, the brief in opposition presents as uncontroverted the reasons given by Schultz for its actions toward petitioners even though such reasons were denied by Dovberg (N. T. 540-541, 556-557), the Schultz testimony was inconsistent on the point (Petition for Certiorari, pp. 33-35), and Schultz's own evidence showed it was acting contrary to its own economic interests in its dealings with petitioners (App., 28a).

The brief in opposition states (pp. 8-9): "* * * while Schultz was supposed to be conspiring to put petitioners out of business, he was paying their bills immediately upon receipt * * *." The evidence shows that Schultz paid its bills "immediately" on only one occasion, and that on most

occasions it paid promply in order to obtain a 2% discount (N. T. 3231-3241). Furthermore, there was no evidence that Schultz had conspired with Papco prior to March of 1952, and the evidence showed that in March, 1952, the Schultz firm was months late paying for deliveries of Nix-Size but, nevertheless, took the discount when it paid (N. T. 3240-3241).

The brief in opposition states (p. 15): "* * * (The record) showed that the only acts complained of that occurred within four years of the suit were after petitioners had become unable to meet current orders, had stopped making Nix-Size, or had actually closed their business, and therefore, that they could not possibly have done petitioners any harm." This suit was filed in September, 1958, and while the brief in opposition persists (pp. 5, 7, 8, and 13) in asserting that 1956 was the last year in which Nix-Size was sold, the evidence showed that petitioners sold Nix-Size until sometime in 1957 (N. T. 1011). The evidence also showed that all times in September, 1954 and thereafter petitioners owned their plant, equipment and truck free and clear of all encumbrances (N. T. 74-78, 83, 119, 826, 873, 1040-1041, 4570); that they had products which they were able to sell at a substantial profit in free and open competition (N. T. 266-267, 407-413, 488-489, 1051-1053, 1056-1057, 1068, 1151-1153, P-396, 4570, 447-452, 717-719, 1072-1081); that they had a national distributor (N. T. 55-66, 122-182, 1590-1591) and credit with their suppliers (other than Dow) and with two banks (N. T. 857, 907-913, P-188, P-189) and that the potential of their business as of September 1954 was between $75,000 and $100,000 (Darby Tr., L40, L50-57, L70-73, L126-127). The evidence, summarized in the dissenting opinion in the Court of Appeals, also showed that, prior to and after September, 1954 with knowledge of Papco's campaign to injure petitioners, Schultz knowingly cooperated with Papco by refusing to deal with Nix-Size and selling Liqui-Size in a deceptively similar package even when Schultz's own experience showed that such sales were contrary to its economic interest. There

was also express evidence[2] that in 1956, 1957, and even 1958 Schultz passed off its product as Nix-Size or the same thing as Nix-Size in all of its stores (App., 27a) but the jury was entitled to infer that this practice was not a recent one, since Schultz had selected the packaging which made this possible in the spring of 1952.

The brief in opposition presents the position, as though the evidence could justify no other, that petitioners failed in business as the result of ignorance and incompetence. Quite obviously, this presentation is wrong. The trial judge's ruling on the motion for a directed verdict, his charge, the jury verdict, the opinions below, all demonstrate that the evidence could be viewed as supporting the contrary conclusion. And the "facts" to which respondents refer in support of this view are taken out of context or incompletely stated.

Thus, the brief in opposition states (p. 9): "* * * Maurice got a cousin to finance him with $15,000 * * *, bought a small building * * * and called it a factory, got some machinery and started to manufacture. After spending $4,000 for a building and $5,000 for sugar, in addition to his other initial expenditures, he never had enough cash to operate with * * *."

This description ignores testimony that the Dovbergs also invested funds and assets of their own funds in the business (N. T. 100-108, 115, 1267-68, 2060, 2067-68), that months were spent in remodeling their factory building (N. T. 73-76), that the equipment purchased was new and the full equivalent of Papco's, and that at the end of 1950 (N. T. 76-78, 401-04), petitioners had a factory, equipment, a delivery truck and substantial quantities of raw materials and packaging, all fully paid for, and credit with their then suppliers (N. T. 857, 2068-71, 2081-82).

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2. While the source of such testimony should not be relevant with the case in its present posture, the fact is that contrary to the implication in the brief in opposition (p. 8), such testimony did not emanate solely from members of petitioners' family (Part. Tr. 4008-4016, 4040-4062).

The brief in opposition (pp. 7-10) gives an incomplete and inaccurate picture of petitioners' credit position. Maurice Dovberg's testimony showed that petitioners obtained and repaid a series of loans with two banks, with whom they still had credit in 1954 (Exhibits P-188-189, N. T. 907-13); that they also had credit with suppliers other than Dow—including their national distributor—after 1954 (N. T. 868-71), and that a few bad checks which they had after 1954, when their problems worsened, were made good promptly (N. T. 870, 913, 1024-26).

As the brief in opposition states (p. 10), Maurice Dovberg did try "* * * to get credit from the Dow Chemical Company in an amount twice his original capital and more than the aggregate of all loans obtained from the Broad Street Trust Co. in four years." This took place in 1956 and 1957, when petitioners' situation had become so desperate by reason of Dow's discriminatory policies and actions of Papco and others that petitioners' only hope of salvation was to obtain methocel at the carload rate on credit in order to fill profitably their then outstanding orders for Calico paste (N. T. 998-99, 1007-08). However, prior to 1956, at a time when petitioners had a national distributor and owned their factory and equipment free and clear, petitioners needed no more from Dow than a supply of the same type of methocel that Dow made available to petitioners' competitors, and the privilege of procuring such supplies at the prices and in the shipment sizes available to their competitors, to cover which shipments, costing $2,000 or less, plaintiffs then had adequate banking credit (N. T. 873-878, 976-77, 2146-48).

The brief in opposition (p. 10) also charges that Maurice Dovberg "* * * had no idea what it actually cost him to produce the products he was selling * * *" and "* * * there was no evidence that he ever made any money from any of his sales * * *." Actually, petitioners' evidence, consisting of schedules based on production formulae and invoices establishing the cost of ingredients and packaging,

established that, prior to difficulties stemming from the activities of the various defendants, petitioners, following a pricing formula slightly more conservative than that of Papco, sold their products profitably both locally and through their national distributor (N. T. 266-68, 407-13, 1051-57, 1149-53; P-168, P-396, Flanagan Tr., Feb. 26, 128).

The brief in opposition, carrying on the same charge that petitioners destroyed themselves, states (pp. 10-11) that petitioners gave unlimited credit, knew nothing of their own capital requirements, could not take year end inventory, and refused to give credit information. There is no need to continue to discuss these charges in detail. There is evidence of record on which a jury could find to the contrary. Thus, the Dovbergs gave as much as 90 days' credit in slow seasons but their biggest customer paid promptly, and their line of credit permitted them to do this. Maurice Dovberg only testified to his difficulty in computing his 1950 year end inventory. Months after that date Dovberg gave more information to Dun & Bradstreet than did Papco, the principal competitor (N. T. 1600; Dovberg Tr., Feb. 14, L-298, L-314). The Broad Street Trust Company produced Dun & Bradstreet reports on petitioners which showed petitioners paid most of their creditors promptly as late as 1955 (Zuecca Tr., Mar. 12-13, 27-32; P-453A-453F). Dovberg gave Hoyt financial statements on three occasions (N. T. 1676-1680, 2015-2016, 2175) and Hoyt knew that petitioners honored their bills (N. T. 887-888, 1605-1606, 2017-2018) and continued to ship on credit (N. T. 2175-2200; P-172, P-173). The Broad Street Trust officer, called as a witness by Schultz, concluded his cross-examination by saying of Maurice Dovberg: "I would say he was an honest man" (Zuecca Tr., Mar. 12-13, 44-51).

The brief in opposition urges that petitioners failed to prove damages, an argument not adopted in either court below. In connection with this argument, petitioners' expert witness, C. H. Darby, is described as "an engineer". Mr. Darby was in fact graduated from Princeton's School of Engineering. In addition, he is a fully qualified expert

in the evaluation of business, and the Eastern District Manager of the nationally known firm of Marshall and Stevens (N. T. Flanagan-Darby Tr., L-6-12, L-31-32).

Mr. Darby testified on the basis of a hypothetical question. Copies of this question were submitted to the four defense counsel at the time Darby testified, and each and every fact which the witness was asked to assume was documented at the time by a reference to the daily transcript and exhibits already in evidence (Flanagan-Dovberg, Tr., L-20-21, L-31-39). The trial judge gave defense counsel an opportunity to establish any respect in which the record did not support the assumptions, and they failed to do so, either during or after the trial.

CONCLUSION.

Accurately and fairly summarized, the record in this case provided support for the jury verdict. The opinion of the dissenting judges in the court below makes the point well. The brief in opposition, in urging affirmance, can do no more than attempt to argue facts. And each such attempt, as this reply illustrates, must fail since, for every factual assertion made in the brief in opposition, there is evidence of record to the contrary. The jury verdict should have been permitted to stand.

For the reasons set forth in the petition for certiorari and herein, the petition should be granted.

Respectfully submitted,

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